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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 105

W. K. CHAPMAN, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of Texas (R. 283) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 300) is reported at 194 F. 2d 974.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1952 (R. 309). The petition for a writ of certiorari was filed on June 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether both courts below erred in holding that petitioners, in a suit for damages under the Federal Tort Claims Act, had failed to establish negligence on the part of the United States.

STATEMENT

Petitioners brought suit under the Federal Tort Claims Act [1] to recover for the death of their son who, as a member of the Civil Air Patrol, was a passenger on a United States Air Force two-engine Beechcraft plane (T-7 type) which crashed near the Municipal Airport at New Orleans, Louisiana. The accident occurred on Sunday afternoon, September 12, 1948, as the plane, in a state of emergency with one engine dead and the other operating rough, came in for a landing. All on board, pilot, co-pilot and four passengers, died.

The action was begun in the United States District Court for the Southern District of Texas. The complaint alleged numerous specific acts of negligence in respondent's operation and maintenance of the plane (R. 10, 13-15) and in permitting flight under unfavorable weather conditions (R. 13-14). The complaint also pleaded *res ipsa loquitur* (R. 11, 12). The answer denied negligence (R. 23-24, 25), pleaded unavoidable accident (R.

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. (1946 ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U.S.C. (Supp. IV) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869. Existing rights and liabilities were not affected by the repeal (62 Stat. 992).

42-44), and set out a release (R. 27-30) which had been executed by the decedent and his father (a petitioner herein), discharging the United States from any claim for death or injury which might occur by reason of the intended flight.

There is no dispute as to the underlying facts. Decedent Walter Kyle Chapman, Jr., was a cadet in the Civil Air Patrol, a civilian volunteer organization and auxiliary of the United States Air Force (R. 66).[2] Members of the CAP are permitted, upon their own request, to fly as passengers on local and cross-country Air Force flights (R. 66-67, 69, 72) for purposes of orientation and familiarization (R. 73-78). To participate in such flights the CAP cadet was required to furnish the release executed by himself and his parent (R. 77-78, 271-275, 292). Here, the necessary release was obtained (R. 32-4, 290-293) and authorization was issued for the decedent to proceed from Houston, Texas, to New Orleans, Louisiana, on the flight in suit (R. 67-68).

The plane took off about 12.30 P. M. from Ellington Field, an Air Force base near Houston, heading for the Municipal Airport at New Orleans (R. 99, 302n). A "25-hour preventative maintenance" inspection of the plane had been completed immediately prior to the flight (R. 151-155) and the radio equipment had been inspected and tested

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[2] The Civil Air Patrol was created by Congress as a benevolent corporation, its purpose being to encourage civilian participation in aviation. Act of July 1, 1946, 60 Stat. 346, 36 U. S. C. 201-208. It was established as an auxiliary of the Air Force by the Act of May 26, 1948, 62 Stat. 274, 5 U. S. C. (Supp. IV) 626l, 626m.

some 48 hours earlier (R. 164-166). The maintenance men found both the plane and its equipment in "perfect" operating condition (R. 154, 166). The pilot was experienced and skillful (R. 96, 305n-306) and was qualified to fly this type of plane under both visual and instrument conditions (R. 96, 100). Before take-off, he had filed his flight plans, was briefed as to weather conditions over the entire route (R. 99-111, 302n-303, 304n-305), and was given a Visual Flight Rules clearance to New Orleans (R. 99, 302n-303).

When the plane was some 65 miles from the New Orleans Airport at 2:37 P. M., the pilot sent a radio message to the Traffic Control Center there reporting that he was 15 miles south of Baton Rouge flying at 2,000 feet and was meeting bad weather and overcast; he requested clearance to change from Visual Flight Rules to Instrument (R. 115-116, 303n). Five minutes later the New Orleans station gave this clearance and at the same time assigned a cruising altitude of 3,000 feet (R. 116-117, 303n). At 3:11 the pilot reported by radio that he was approximately 10 miles out of New Orleans flying at 3,000 feet but was unable to determine his position, and that his radio receiver was not operating (R. 117, 303n). The New Orleans station immediately instructed the pilot to advise the amount of fuel aboard and whether he desired that another suitable landing field be selected where better weather conditions prevailed (R. 118, 303n). This message was not acknowledged and apparently was not received (R. 118, 303n). At 3:13 the pilot re-

ported by radio that he would come down through a hole he had found in the overcast (R. 118-119, 303n). At 3:24 he radioed that he was at 750 feet, flying on only one engine, that he was in emergency and would land at the first field he came to (R. 119, 303n). The New Orleans station immediately alerted all fields and towers in the vicinity to clear their traffic and stand by for emergency (R. 119-120, 303n). At 3:32 the pilot radioed that he was coming down near the edge of a lake, that one engine was out and the remaining one functioning rough (R. 120, 303n). A notation on this message, apparently made by the radio operator who received it, stated that the first field would probably be the Navy Auxiliary Field (R. 120, 303n). That field had been alerted (R. 48-50). It is located near the edge of Lake Pontchartrain about two miles from the New Orleans Airport. It is surrounded by buildings and highways which make it difficult to locate, especially by one not familiar with it (R. 120-122).

About the time the last message was received, the plane was seen flying slowly one mile west of the Navy field at an altitude of approximately 200 feet (R. 50, 304n). A green light was flashed as a signal that the plane could land there (R. 51, 304n). The plane did not acknowledge the signal but flew on within a half mile of the field (R. 51-52, 304n). As it approached the New Orleans Airport it was lined up with one of its runways; a green light was flashing giving permission to land; without acknowledging this signal, the plane made a right

turn and then began a left turn to line up with another runway. It was now at an altitude of about 200 feet, three quarters of a mile away. A green light was directed to the aircraft signalling permission to land on the second runway. This signal the plane acknowledged by blinking its landing lights. As the plane continued to execute the left turn and began to lower its landing gear, it went into a spin, crashed and burned. (R. 250, 304n.)

At the trial, petitioners introduced no evidence on the negligence issue except in support of their contention that the pilot was not adequately briefed as to the weather (R. 179-225, 242-247, 304n-305). But they offered in evidence an accident investigative report relating to this accident prepared by a Board of Air Force Officers (R. 250-251). The contents of the report are described in the opinions of the courts below (R. 289, 306n-307). It includes the Board's opinion that among the causes of the accident was poor judgment of the pilot in not attempting to land at the Naval Air Station and in electing to fly a regular pattern at the New Orleans Airport instead of making a straight-in approach (R. 301 and see excluded exhibit, Report of Major Accident, Sec. M). The report was offered as a record made in the regular course of business and as an admission against interest (R. 250). At other points during the trial, when the Government introduced individual documents which happened also to have been included in the report, petitioners asked that the entire report be admitted in evidence (R. 97, 124, 171-173, 254).

The District Court sustained the Government's objection to the admissibility of the report (R. 290), found that the petitioners had failed to prove negligence (R. 290, 294) and in addition held that the release precluded any recovery (R. 294). The Court of Appeals for the Fifth Circuit reviewed the evidence as to negligence, found that petitioners failed to satisfy their burden of proof on that issue, held that the accident report was properly excluded, but if its exclusion was error, was harmless, declared that in view of its determination on the negligence question it was unnecessary to pass on the issue of release,[3] and affirmed the judgment for respondent (R. 300-309).

ARGUMENT

1. Essentially, the petition seeks nothing more than a review of the evidence underlying a factual issue, *i.e.*, the question of negligence, which was resolved against the petitioners by both courts below. Both courts found that petitioners had failed to show negligence. Indeed, as stated by the court below, a finding of negligence on the part of the pilot "would do great violence to the evidence" (R. 306). "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors,* 335 U. S. 211, 214. See also Rule 52, Federal Rules of Civil Procedure. The careful consideration given to the evidence in the

[3] For the same reason we do not believe it necessary to discuss herein any question relating to the validity of the release.

opinions below patently demonstrates that no such error is present.

Nor does the result reached below turn on the refusal of the trial court to admit certain documentary evidence, specifically, an accident investigative report prepared by the Air Force. For, despite petitioners' emphasis on a claimed conflict of decisions under the Federal Business Record Act (62 Stat. 945, 28 U. S. C. (Supp. IV) 1732), and despite their attempt to avoid the rule of *Palmer* v. *Hoffman,* 318 U. S. 109, the plain fact is that both courts had the report before them, both read and examined it, and after weighing its contents, the Court of Appeals declared (R. 308):

> * * * we are of the clear opinion that nothing in the report, which the judge had before him and read, and which is before us in the record, requires or supports a different finding as to negligence from that made by him, and its exclusion, if error, was harmless.

To avoid the effect of the harmless error provisions of Rule 61, Federal Rules of Civil Procedure, petitioners must show that they have been denied substantial justice,—*viz.,* that the excluded evidence was "of real persuasive value." *Balchunas* v. *Palmer,* 151 F. 2d 842, 845 (C.A. 2). In that connection, it is significant that petitioners concede that the factual data included in the report is already in evidence (Pet. pp. 10-11). However, they stress the exclusion of the opinions and conclusions of the Air Force Board contained in the report as to the pilot's judgment, which the court below aptly

termed "the *post hoc* armchair speculations of the report" (R. 305). Petitioners' claim of prejudicial error—indeed, their principal ground for seeking review—consists of no more than an attack on the refusal of the courts below to admit and give determinative effect to mere opinions and speculative statements. Such refusal presents no important or novel question of evidence warranting review by this Court.

2. Petitioners' arguments relating to the doctrine of *res ipsa loquitur* and the rule relating to acts performed in sudden emergencies raises the same evidence question in a different manner. These contentions are but other methods of seeking review of evidentiary matters.

The effect of the *res ipsa loquitur* rule is simply that the facts of the accident themselves constitute a *prima facie* case which will permit an inference of negligence but which does not compel it. *Sweeney* v. *Erving,* 228 U.S. 233, 240; *Jesionowski* v. *Boston & Maine R. Co.,* 329 U. S. 452, 457. The burden of proof is not thereby shifted to the defendant and it remains for the trier of the facts to determine whether the preponderance of evidence is with the plaintiff. *Sweeney* v. *Erving, supra.* Here, respondent introduced substantially all the evidence in the record relating to the accident. That evidence—assuming, but not conceding, the *res ipsa loquitur* rule to be applicable—was sufficient to rebut the *prima facie* case. Both courts weighed all of the evidence and both courts declined to find negligence, holding that petitioners had failed to

sustain their burden of proof. Manifestly, whatever procedural benefits petitioners could obtain under the *res ipsa loquitur* doctrine were in fact obtained. The action was not dismissed for failure to make out a *prima facie* case but judgment was rendered for respondent because both courts below declined to draw the inference of negligence. This Court has repeatedly said that certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *United States* v. *Johnston*, 268 U. S. 220, 227; *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508.[4]

No question peculiar to the Tort Claims Act is raised by the petition, nor would review here be dispositive of other airplane cases. For, in the last analysis, despite the suggestion implicit in petitioners' argument that the doctrine of *res ipsa loquitur* should be applied to and the rule relating to acts performed in sudden emergencies excluded from every aviation case, it is well established that the application of both doctrines depends ultimately upon the particular circum-

[4] There is no conflict with *United States* v. *Kesinger*, 190 F. 2d 529 (C.A. 10). There, a motion to dismiss was made at the close of plaintiffs' evidence, thus raising the question whether they had made out a *prima facie* case. The application of the doctrine of *res ipsa loquitur* compelled an affirmative answer. Thereafter, the court found negligence not by inference from the facts of the accident but from the direct evidence introduced by defendant, 190 F. 2d at 531, 533. No such motion was relied upon in the instant case and the court declined to draw the inference from either the facts of the accident or the other evidence introduced.

stances of the accident involved in each case.[5] Nothing in the Tort Claims Act even remotely suggests any different rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that further review is not called for and that the petition for a writ of certiorari should be denied.

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JULY, 1952.

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[5] *Res ipsa loquitur* is applicable only when the accident is one which ordinarily does not occur in the absence of negligence. *Jesionowski* v. *Boston & Maine R. Co., supra.* It is an accepted fact that the most carefully maintained and operated airplane may crash for any one of a variety of causes apart from negligence. See, *Johnson* v. *Eastern Air Lines,* 177 F. 2d 713, 715-716 (C.A. 2). That is one reason why most courts, especially where defendant is not a common carrier airline, hold the doctrine inapplicable in suits for damages resulting from airplane crashes. See, Prosser on *Torts* (1941), p. 296; Rhyne, *Aviation Accident Law* (1947), Ch. VIII and IX; 6 A.L.R. (2) 528.

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